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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 266

MERRITT-CHAPMAN & SCOTT CORPORATION,
Appellant,

vs.

BERNICE M. FRAZIER,
Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

MERRITT-CHAPMAN & SCOTT CORPORATION,
Appellant,

vs.

BERNICE M. FRAZIER,
Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 18, 1961.

OPINIONS BELOW

The District Court did not deliver an opinion upon the rendition of the judgment. The opinion of the Court of Appeals (infra, App.* pp. 1-17) is reported in 289 F.2d 849 (9th Cir. 1961).

*"App." refers to the Appendix to this petition. "T." refers to the typewritten transcript, Vol. III of the Record in the Court below.

JURISDICTION

The judgment of the Court of Appeals was made and entered on April 18, 1961 (App. 18). A petition for rehearing was filed within the time allowed, on May 15, 1961 (T.* 544) and denied on June 14, 1961 (T. 544). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Does a compensation award of the Industrial Commission of Arizona become final and res adjudicata in the absence of a petition for rehearing, filed within the time allowed by the rules of such commission?

2. Was the instrument entitled "election of remedies" a petition for rehearing, or did it serve as such?

3. Was petitioner denied a right granted by the constitution of Arizona when the court refused to submit the defenses of contributory negligence and assumption of risk to the jury?

4. Is the judgment so monstrous that it must be set aside?

5. Should a court of the United States stay further proceedings, in a diversity, when it appears that:

(a) there is an action pending in the state court, between the same parties and involving the governing issues of state law, including the validity of an applicable statute under the state constitution;

(b) there is doubt as to the state law, and if the judgment should later be displaced by a determination in the state court, the judgment would: (i) operate to permit respondent to make a double recovery which is prohibited by the state law; (ii) operate to subject petitioner to a double liability on the same cause in violation of the state law; (iii) fail

to provide petitioner with a discharge of its liability on the cause of action after the petitioner has paid and performed the judgment; (iv) deprive the petitioner of its property in violation of the law of the state?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF THE INDUSTRIAL COMMISSION OF ARIZONA

The following constitutional provisions, statutes and rules of the Industrial Commission of Arizona are involved. Because they are lengthy, their texts are set forth in the appendix.

Constitutional Provisions

Amendment V, Constitution of the United States (App. 18, 19).

Amendment XIV, Section 1, Constitution of the United States (App. 19).

Article 2, Section 4, Constitution of Arizona, Vol. 1, A.R.S., p. 114 (App. 19).

Article 2, Section 13, Constitution of Arizona, Vol 1, A.R.S., p. 115 (App. 19).

Article 18, Section 5, Constitution of Arizona, Vol. 1, A.R.S., p. 178 (App. 19).

Statutes

Section 12-612(A), A.R.S., Vol. 4, p. 148 (App. 19, 20).

Section 12-612(C), A.R.S., Vol. 4, p. 148 (App. 20).

Section 12-613, A.R.S., Vol. 4, p. 154 (App. 20).

Section 14-201, A.R.S., Vol. 6, p. 19 (App. 20).

Section 23-1021(B), A.R.S., Vol. 8, p. 328 (App. 21).

Section 23-1023(B), A.R.S., Vol. 8, p. 351 (App. 21).

Section 23-1024, A.R.S., Vol. 8, p. 355 (App. 21, 22).

Section 23-1025, A.R.S., Vol. 8, p. 357 (App. 22).

Section 23-1061(C), A.R.S., Vol. 8, p. 394 (App. 22).

Rules of Industrial Commission of Arizona
Effective June 15, 1959

Rule	Page on which it appears in official publication		Rule	Page on which it appears in official publication	
37	9	(App. 23, 24)	71	16	(App. 25)
38	10	(App. 24)	72	16	(App. 25)
39	10	(App. 24)	73	16	(App. 25)
40	10	(App. 24)	74	16, 17	(App. 25, 26)
41	10	(App. 24)	75	17	(App. 26)
70	16	(App. 25)	76	17	(App. 26)

STATEMENT OF THE CASE

Jurisdiction of the United States District Court for the District of Arizona (the court of first instance) existed under Title 28, U.S.C.A., 1332(a)(1).[1] Respondent instituted this action by filing her complaint in the said court of first instance praying judgment for damages against petitioner in the sum of $350,000. Respondent alleged she was a resident of the state of Arizona, and that petitioner was a corporation chartered by and existing under the laws of the state of Delaware (R. 3).[2] These allegations were admitted in petitioner's answer (R. 8).

The facts material to the consideration of the questions presented are:

On the morning of August 24, 1957, Robert C. Frazier, (deceased[2]), was fatally injured by falling rock at the Glen Canyon Damsite in Northern Arizona (R. 4-6). He was employed by Mountain States Construction Company (employer) (R. 137) as a drill and blasting foreman (R. 163). Employer was a prime contractor engaged in driving the

1 This action was filed on July 3, 1958 (R. 2) and is governed by the said Title 28, U.S.C.A., Section 1332(a)(1), as it was then effective.

"R" refers to the printed Record in the Court below.

2 For convenience and brevity, we will refer to those involved by the names set forth in brackets after the first mention of the name.

west diversion tunnel (R. 105). Such tunnel entered the west canyon wall at the river level, upstream, and proceeded around the damsite, re-entering below. It permitted the flow of the stream to bypass during construction of the dam (R. 107, 108). The canyon is about seven hundred feet deep, a thousand to thirteen hundred feet wide and, although the walls appear almost vertical, they do incline (R. 109). Merritt-Chapman & Scott Corporation (petitioner) was also a prime contractor (R. 105, 106). Its work was the excavation for, and construction of the dam (R. 106). At the time petitioner was engaged in excavating the west spillway near the top of the canyon wall, between the damsite and the upstream portal of the diversion tunnel (R. 120, 320, 321). In the afternoon of the day before (August 23), petitioner had blasted, throwing great amounts of material into the canyon and on to a road below (R. 130-132), leaving extensive areas of shattered and loose rock along the canyon rim (R. 141, 346).

The road was near the river on the talus (the loose material that had fallen from the canyon walls). It ran along the west bank between the tunnel portals (R. 116). Some two hundred fifty yards of the material remained on the road (R. 132, 133) and a bulldozer was there making the road passable when the fatal rock slide occurred (R. 136, 137). The deceased was walking upstream along the road over the fallen rock and debris, under the spillway excavation (R. 137).

Superintendent Donohoe (Donohoe) was the deceased's immediate superior (R. 256). Mr. Chris Nielsen (Nielsen) was in charge of the spillway excavation for petitioner (R. 318, 320). There was a dispute between Donohoe and Nielsen as to when employer could safely use the road. Donohoe said that Nielsen had told him all of the loose and shattered material on the canyon rim would be scaled

(jarred loose by scalers and permitted to fall) during the night (R. 231, 239). Nielson contended that he had told Donohoe that the blast would close the road; that a shovel would be working in the morning; it would be dangerous for anyone to go below, and that the road should not be used (R. 330-335).

Notwithstanding employer sent its men into the area and the road was being used early on the morning of August 24 (R. 241, 242). Employer's men, including deceased, had gone to work earlier than the usual seven o'clock a.m. (R. 242), when petitioner's men began work (R. 322). It was after petitioner's men came to work (R. 243) and were operating a large shovel near the canyon rim (which could be seen from the vicinity of the north portal of the diversion tunnel) that the accident occurred (R. 293).

Employer had insured its workmen's compensation risk with the Arizona State Compensation Fund (R. 11), which is administered by the Industrial Commission of Arizona (commission). Respondent filed a claim with the commission for the death benefits provided by the Arizona Workmen's Compensation law (WCL) on September 28, 1957 (R. 27). A formal award therefor was made on December 3, 1957 in favor of respondent and her minor children (children) (R. 11-13). On December 23, 1957 (R. 28) respondent filed with commission an instrument entitled "election of remedy" notifying commission that respondent elected to sue a negligent third party for damages under the state death statute (R. 41-46).

Respondent then filed this action (R. 28). Petitioner answered (R. 7-13) and filed its motions for summary judgment (R. 14) and for determination of the jurisdiction (R. 14). In such motions it contended that the award for WCL death benefits had become final because of the failure

to file within the time allowed of a petition for rehearing, and that, therefore, jurisdiction to ignore or disturb the award did not exist. These motions were denied (R. 16, 17). Petitioner then filed a motion to add the commission as a party (R. 20), asserting that the presence of the commission was necessary to a final and binding determination of the rights of petitioner, and that, unless joined, petitioner would be subject to another liability on the same cause (R. 20-23). It also filed a motion that the court stay further proceedings pending determination of governing questions of state law in a declaratory judgment suit that petitioner had filed in the state court (R. 23, 49). Involved in that action were questions of the constitutionality of the state statute fixing the measure of damages for wrongful death (R. 35), and of interpretation of ap- [illegible] state statutes and case law (R. 30-32). A copy of the complaint in such action was ab[illegible] exhibit attached to the motion (R. 25). These motions w[illegible]re denied (R. 50), and that portion of defendant's answer [illegible]elating to the effect of the final award was stricken (R. 50).

The jury rendered a verdict for [illegible]he respondent for $200,000 (R. 58), upon which judgme[illegible]t was immediately entered (R. 58). The motion for a ne[illegible] trial filed on February 24, 1959 was denied on April [illegible] 1959 (R. 68). The appeal to the Court of Appeals, pe[illegible]ected on April 30, 1959 (R. 69), was argued and sub[illegible]tted on March 11, 1960 (T. 526). A little over a year la[illegible]r, on April 18, 1961, the opinion was filed (T. 527) and [illegible]dgment entered (T. 543). On May 15, 1961 a petition fo[illegible] rehearing was filed. It was denied on June 14, 1961 (T. 54[illegible]

ARGUMENT

The Court of Appeals Has Decided Important Questions of State Law in Ways That Are in Conflict with Applicable State Law.

I. The court below refused to recognize or give proper effect to a final award of the Industrial Commission of Arizona.

The District Court disregarded the compensation award on the basis that respondent was not aware of the legal significance of filing an application therefor; that such filing was not a valid election, and the award based thereon was void (R. 92). The Court of Appeals chose not to so ignore the award; but, upon a new theory that was neither urged nor argued and which first appeared in its opinion, held the award did not become final (App. 5, 6). Its reasoning was that respondent filed an instrument entitled "election of remedies" within the twenty days allowed for filing a petition for rehearing, and such instrument either constituted a petition for rehearing or served as such, prevented the award from becoming final, and thereby continued the jurisdiction of the commission to deal with the award (App. 5, 6).

Thus, the Court of Appeals recognized that the vital question was not whether a valid election to take compensation had been made, but was whether the award became final and forever and finally determined that a valid election to take compensation had been made. By choosing to approve the action of the District Court upon that ground, the Court of Appeals demonstrated an awareness of the serious results that could flow from a decision removing the attributes of finality from many existing awards of the Commission.

The question then is: Did the filing of the instrument referred to as "election remedies" continue the jurisdiction of the commission to deal with the award?

The rules of the commission relating to petitions for rehearing are: Rules 37, 38, 39, 40 and 41 (App. 22-24). Those relating to elections are: Rules 70-76, inc. (App. 25, 26).

It is Rule 74 (App. 25) which prescribes Form Number C-471, which is the instrument referred to in the opinion of the court below as "election of remedies."

When the rules relating to elections are placed beside those relating to petitions for rehearing, a real distinction is readily apparent. The "election of remedies" is a "written notice" to the commission, Rules 71, 74 (App. 25). A petition for rehearing is not a notice. It is a formal verified pleading which "must set forth specifically and in detail the grounds on which the applicant therefor considers such award * * * to be unjust or unlawful" Rule 38 (App. 23). Failure to file it within the time "constitutes a waiver of the right to rehearing" Rule 37 (App. 22). It must be served upon all adverse parties, may be answered by them, Rule 40 (App. 24), and a formal hearing is held thereon, Rule 41 (App. 24). The commission may also hold a rehearing on its own motion upon ten days notice, Rule 39 (App. 24).

Rule 37 (App. 22, 23) also provides for the filing of a "notice of protest" which "will stay" and "award or decision from becoming final" and extends the time for filing a petition for rehearing until twenty days thereafter.

The one Arizona case that squarely fits the facts in this case and which determined the applicable state law is *Smith v. Industrial Commission*, 65 Ariz. 43, 173 P.2d 753 (1946). In that case applicant's counsel advised the commission by letter:

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3 This case bears the same name as the case which the court below relied on. App. 5. However, this case apparently was not considered below because the question decided was not there urged or argued and a rehearing on this issue was refused.

> "Mr. Smith wishes to apply for rehearing from the amended findings and award above referred to and this may be considered notice of such application as required by law in the rules and regulations of the Commission. Formal petition and application for rehearing will be filed within a very short time when results of medical examinations which Mr. Smith has taken are available and may be referred to in the formal application." (173 P.2d 754)

Like this case, no petition for rehearing was thereafter filed. The applicant's contention was stated by the court:

> "So, we see that the contention of the petitioner is that the commission should have considered the letter of the attorney for petitioner, letter dated April 11, 1945, as his petition for rehearing and should have set the matter down for hearing." (173 P.2d 755)

The court then set forth Rules 37 and 38 of the commission (App. 22, 23); held they had not been complied with; that the jurisdiction of the commission to deal with the final award had been exhausted and could not be recreated. The court serniticantly stated:

> "The rule does not provide for the giving of any notice; the rule requires an application to be filed." (173 P.2d 757)

The court below recognized that the instrument referred to as "election remedies" was just a notice to the commission (App. 5), and the applicable law should have been followed.

There is an unbroken line of decisions in Arizona holding that timely compliance with the rules of the commission relating to petitions for rehearing is the only way the finality of an award can be stayed; that such is jurisdictional, and, once jurisdiction of the commission is exhausted, it cannot be recreated. *Green v. Industrial Com-*

mission, 78 Ariz. 347, 280 P.2d 208 (1955) and *Navajo Power v. Tucson Gas & Elec. Co.*, 80 Ariz. 115, 293 P.2d 671 (1956) are representative.

Lembke v. Industrial Commission, 71 Ariz. 111, 223 P.2d 929 (1950) is significant because it holds that an award of the commission has equal dignity to that of judgments of a court, and that all issues determined or that could have been determined are res adjudicata.

The authorities cited by the lower court as recognizing "that the commission may in its discretion waive formal defects in a petition for rehearing," Note 4, page 4 of the opinion (App. 5) do not support the statement. *Nolan v. Rhodes Co.*, 69 Ariz. 277, 212 P.2d 999 (1950), holds that the petition for rehearing therein was insufficient because it did not comply with the commission's rules. This is exactly contrary to what the case was cited as authority for. A reading of *Rhoades v. Lee Wilson Contracting Co.*, 60 Ariz. 161, 132 P.2d 432 (1942), discloses that the petition there considered was an "application for readjustment of compensation" filed under Section 23-1061(C), A.R.S. (App. 22), which application the commission never lost jurisdiction to entertain. *Nevitt v. Industrial Commission*, 70 Ariz. 172, 217 P.2d 1039 (1950), A petition for rehearing was not filed in that case. *Kavalieff v. Industrial Commission*, 65 Ariz. 28, 173 P.2d 636 (1946), did not concern a petition for rehearing. What was concerned was the sufficiency of a letter to constitute a protest under Rule 28 (App. 23). The commission refused to consider the letter such a protest because it was wholly typewritten. The court very properly held the letter did constitute a protest because the rule did not require that the protest be signed in hand writing.

In the light of these authorities, it is submitted that, not only did the court below refuse to accord the applicable

law of the state on this important and governing question, but instead, in violation of the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), invaded the independence of the state and substituted its views of what the law of the state should be.

II. There was sufficient evidence to require that the issues of contributory negligence and assumption of risk be submitted to the jury.

The court refused to submit the pleaded defenses—contributory negligence and assumption of risk—to the jury (R. 495). It is undisputed that the conditions in the canyon on the morning of the accident presented a very extreme hazard, and that anyone going beneath was "either foolish or stupid" (R. 349). Deceased was drill and blasting foreman in charge of all scaling, high drilling and blasting (R. 163). He was experienced in the canyon, being the only man left on the job who had started it (R. 164). To such a man the extreme hazard was readily apparent. Even men with no experience in drilling, blasting and scaling high, steep canyon walls would know that a blast on the rim of an almost vertical seven hundred foot drop of sufficient magnitude to throw hundreds of yards of broken material upon the road below and to leave great amounts of shattered rock on the rim which were being removed with a large shovel and trucks, would be greatly hazardous to anyone who ventured below it. Plainly, observable hazards are presumed to be known by those who can observe, and one is bound to protect himself as against danger that is so obvious that an ordinary prudent person under the circumstances would have appreciated it. So held this court in an Arizona case *Gila Valley G. & N. R. Co. v. Hall*, 232 U.S. 94, 102 (1914).

The jury could have found for petitioner on the issues of contributory negligence or assumption of risk and, because the Arizona constitution makes the jury the sole judge of those defenses, Article 18, Section 5, Arizona Constitution (App. 19), the petitioner was denied this constitutional right.

III. The amount of the verdict and judgment finds no support in the evidence or the law of the state, and is monstrous.

The verdict and judgment were for $200,000 (R. 58, 59). Providing the jury followed the instructions, this sum represented the present monetary value of the loss (R. 501, 502). The statute measuring damages recoverable, Section 12-613, A.R.S. (App. 20), allows compensatory damages only. So held the Colorado Supreme Court on an almost identical statute, *Moffatt v. Tennon*, 17 Colo. 189, 30 Pac. 348 (1892); reaffirmed *Fish v. Libon*, 120 Colo. 56, 208 P.2d 930 (1949). In any event, the damages recoverable could not exceed what the deceased could have during his lifetime acquired, as shown by the evidence. Certainly he could not contribute more than what he acquired.

The gross earning under the most favorable view of the evidence was $900 a month (R. 224). Upon a twelve-month basis of continual work, he could earn $10,800. With a life expectancy of twenty-nine years, the most he could earn during his life for continuous work throughout would be $313,200. Without deducting any part for his own needs and disregarding contributions he probably would not make to his children after they attained their majority, the deceased could under no circumstances contribute more than $313,200 as it was earned over the twenty-nine years.

Could $200,000 under any circumstances disclosed by the evidence represent the present value of the said $313,200?

The annual earning alone of a $200,000 fund invested in United States bonds would be from $6,000 to $7,000, which is tax exempt, and which is probably more than deceased under the most favorable view of the evidence could have contributed. Patently the jury did not follow the instructions, or it allowed passion and prejudice to control its judgment. A judgment must reflect a fair and sound consideration of the evidence. The evidence fails to support the judgment. It is not realistic or sound. It is monstrous and should not stand.

The Court Below Decided Important Questions of Federal Law in Conflict with Applicable Decisions of the United States Supreme Court and of Another United States Court of Appeals.

Should this application be denied, payment of the judgment would surely precede a definitive determination of the controlling issues of state law. This judgment, when final, will always remain res adjudicata as between the parties and, no matter how erroneous it later turns out to have been, it will not be open to correction. After petitioner pays the judgment, should the state supreme court then uphold the finality of the compensation award, these results would follow:

1. Respondent and the children would force payment of the compensation award, Section 23-1021(B), A.R.S. (App. 21). In Arizona such an award must be paid; cannot be alienated, Section 23-1025, A.R.S. (App. 22), and neither can its payment be denied because of fraud or estopped, *Worthington v. Industrial Commission*, 85 Ariz. 310, 33 P.2d 363, 367 (1959).

2. The commission as the assignee of the death claim would then sue petitioner, Section 23-1023(B), A.R.S. (App. 21); *Mosely v. Lilly Ice Cream Co.*, 38 Ariz. 417, 300 Pac. 958 (1931).

3. The judgment in this case will have then served the purpose of:

(a) Permitting respondent to recover both under the death statute and the compensation law, contrary to the state law, *Jeane v. Industrial Commission*, 77 Ariz. 410, 274 P.2d 85, 87 (1954).

(b) Subjecting petitioner to a double liability prohibited by the state law, Section 23-1023(B), A.R.S. (App. 21).

(c) Depriving petitioner of its property contrary to the state law and *without due process of law in violation of* Section 1 of the Fourteenth Amendment to the Constitution of the United States (App. 19); *York v. State of Texas*, 137 U.S. 151 (1890), and also in violation of Article 2, Section 4 of the Constitution of Arizona (App. 19).

(d) Denying petitioner equal protection of the law in violation of Article 2, Section 13 of the Constitution of Arizona (App. 19), the Fifth Amendment (App. 18, 19), and of Section 1 of the Fourteenth Amendment to the Constitution of the United States (App. 19), in that: (i) petitioner was compelled to defend this action and perform the judgment, and then at a later time will have to defend again the same cause and abide the judgment in that case; (ii) performance of this judgment would not serve to discharge petitioner, nor would it be res adjudicata as to the second case; (iii) respondent, on the other hand, could not lose because she had no claim in the first place. If, however, she could, as she successfully did here, obtain a judgment based upon an erroneous ascertainment of the state law, and force its payment before a definitive determination could be had in the state court, she could thereby make a double recovery despite the state law prohibiting it.

Manifestly the petitioner has been discriminated against. It has not enjoyed like conditions or like protections to

those enjoyed by the respondent, and equal protection of the law has been absent.

One of the grounds of the motion to stay this proceeding until a definitive determination of the state law could be had in the case pending in the state court, was that the statute prescribing the measure of damages for wrongful death, Section 12-613, A.R.S. (App. 20) was unconstitutional. Manifestly the statute is unconstitutional for the reason that it is so indefinite and uncertain that it is incapable of being intelligently executed, *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854 (1949); *City of Tucson v. Stewart*, 45 Ariz. 36, 40 P.2d 72 (1935), and *State Board of Control v. Buckstegge*, 18 Ariz. 277, 158 Pac. 837 (1916).

It also violates Section 1 of the Fourteenth Amendment of the Constitution of the United States (App. 19) and Article 2, Section 13 of the Constitution of Arizona (App. 19), in that it descriminates between the survivors of the deceased (those entitled to recover) to an extent that equal protection of the law is denied.

Therefore, the order refusing to stay the proceeding was in conflict with the following decisions of this court: *Texas v. Pullman Co.*, 312 U.S. 496, 499, 500, 501 (1941); *Chicago v. Fieldcrest Dairies, Inc.* 316 U.S. 168, 169, 172, 173 (1942); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229, 230 (1957); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 31 (1959); *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176-178 (1959), and *Martin v. Creasy*, 360 U.S. 219, 223, 224 (1959).

The decision also is in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in the case of *Chicago B. & Q. R. Co. v. City of North Kansas City*, 276 F.2d 932 (1960).

CONCLUSION

The instant case presents important questions of applicable state law, including the constitutionality of the statute prescribing the measure of damages for wrongful death. In addition, there is a clear picture of an occasion where, if the lower courts have guessed incorrectly, then the judgment of a United States Court will become a vehicle of oppression, making a shambles and a mockery of the due process of law and equal protection of law provisions of the constitutions of the United States and of the state, and also of the settled state statutory and case law. To a great degree, grounds requiring abstention, until protection of the petitioner's rights can be assured, do here exist.

Respectfully submitted,

RICHARD G. KLEINDIENST
Attorney for Petitioner

ROCLAND W. HILL and
SHIMMEL, HILL, KLEINDIENST & BISHOP
Of Counsel

(Appendix Follows)

Appendix

United States Court of Appeals for the Ninth Circuit

No. 16,543—April 18, 1961

MERRITT-CHAPMAN & SCOTT CORPORATION,
Appellant,

vs.

BERNICE M. FRAZIER,
Appellee.

OPINION

On Appeal from the United States District Court
for the District of Arizona

Before: STEPHENS, Senior Circuit Judge; MERRILL and KOELSCH, Circuit Judges

Koelsch, Circuit Judge:

This is an action for wrongful death under the statutes of Arizona.[1] Jurisdiction of the District Court is based upon diversity of citizenship.

On August 24, 1957 Robert C. Frazier was instantly killed by a rockslide at the site of the Glen Canyon Dam near Page, Arizona. He was then working at the bottom of the canyon on the westerly side of the Colorado River where his employer, Mountain States Construction Company, was engaged in driving a tunnel through which to divert the water of the river while the dam was being constructed.

Thereafter Bernice M. Frazier, his surviving widow, on behalf of herself and the decedent's four minor children,

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1. Sections 12-611 and 12-613, Ariz. Rev. Stat.

commenced this action in the District Court for damages against Merritt-Chapman & Scott Corporation, the company building the dam. She charged in her complaint that the defendant, in the course of excavating near the rim of the canyon above the place where Frazier was working, had negligently caused the fatal slide. The jury rendered a verdict in favor of plaintiff, judgment was duly entered, and the defendant has appealed.

Defendant contends that the District Court lacked jurisdiction over the subject matter of his suit because before plaintiff filed her complaint the cause of action for Frazier's death had been irrevocably vested in the State of Arizona for the benefit of the Workmen's Compensation Fund of that State.

The Workmen's Compensation Act of Arizona extends monetary benefits to the dependents of an employee who, while engaged in his duties, is killed by the wrongful act of a third person not in the same employ. However, such dependents may not claim the death benefits available to them under the Act and in addition prosecute the cause of action for wrongful death: they must choose between the two rights (St. ex rel Ind. Comm. v. Reese, 74 Ariz. 425, 250 P.2d 1001 (1952)). The Act also provides that if the "election" is to take compensation then "the claim against such other person shall be assigned to the state for the benefit of the compensation fund or to the person liable for the payment thereof" (Sec. 23-1023, Ariz. Rev. Stat.) and that a ". . . legal representative in event death results, who makes application for an award . . . waives the right to exercise any option to institute proceedings in court . . . ." (Sec. 23-1024 A., Ariz. Rev. Stat.) However, an application for an award of death benefits will constitute the requisite "election" (which effects the transfer of the cause of action to

the state by operation of law (Moseley v. Lily Ice Cream Co., 38 Ariz. 417, 300 Pac. 958 [1931]) but only if, the applicant when filing the application has knowledge "(1) of the alternative remedies and (2) that the acceptance of one waives the right to the other [citation omitted]. With this construction Sec. 56-950, supra (i.e., A.R.S. 23-1024, Ariz. Rev. Stat.), is constitutional.[2] If the applicant does not have this knowledge, whether his ignorance be one of law or fact, he has in fact made no binding election." State v. Pressley, 74 Ariz. 412, 416, 250 P.2d 992 (1952).

Defendant initially raised the issue of jurisdiction in the District Court by motion for summary judgment. This motion was denied, defendant then renewed the objection and was granted a hearing on the issue. The evidence was undisputed: Mrs. Frazier had applied for benefits following her husband's death, but testified that at the time she was ignorant of her right to bring suit against defendant. She did not learn of this right until shortly before December 3, 1957, the date when the Industrial Commission of Arizona entered an award in favor of Mrs. Frazier and her children. It also appears that on December 23, 1957, Mrs. Frazier, by an instrument entitled "Election of Remedy," notified the Industrial Commission that she elected to prosecute the cause of action against the wrongdoer and the Commis-

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2. Appellant suggests that the scienter requirements were imposed as a result of Article 18, Section 6 of Arizona Constitution, which prohibits the abrogation of only common law action for personal injuries (see Alabam's Freighlv. Hunt, 29 Ariz. 419, 242 Pac. 658 (1926)); and that since action for wrongful death is purely statutory (See, 12-611, A.R.S. Rev. Stat.); In re: Lister's Estate, 22 Ariz. 185, 195 Pac. 1113 (21), the Constitution does not prohibit an "election" of remedies though made without the requisite knowledge. This argument is answered by Worthington v. Industrial Comm., 85 Ariz. 310, 338 P.2d 363 (1959), wherein the Arizona Supreme Court recognized that the same requirement of a "reasonable" election applies equally to the statutory action for wrongful death.

sion, on January 14, 1958 made an order suspending and withholding payment under the award. No payments have ever been made.

At the conclusion of the hearing, the District Court rejected the defendant's objections to jurisdiction, saying:

> The essential finding is that the plaintiff, Bernice Frazier, at the time when she made the claim for compensation did not know of her right to elect to bring an action against the third party as provided by the statute; that thereafter when advised of her rights, she promptly made an election in the light of her alternative benefits, and that the election was timely and validly asserted, and that accordingly this Court has jurisdiction of this action, the Court concludes as a matter of law.
>
> The objection to the jurisdiction of this Court is denied.

Defendant does not contend that this conclusion of the District Court lacks evidentiary support but rather vigorously urges that the award which the Commission made on December 3, 1957 pursuant to plaintiff's application constituted an adjudication of all matters essential to an allowance of death benefits including the fact that plaintiff had made a valid election; and that this award was a final one which under Rule 37 of the Commission may not be set aside, modified or otherwise disturbed unless a petition for rehearing is filed within twenty days of the service of the award.[3]

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3. This argument rests upon the proposition stated by the Arizona Supreme Court that:

> The Commission had jurisdiction of the subject matter and in the exercise of that jurisdiction it had the power to determine the effectiveness of the rejection. It probably erroneously decided the matter but its decision was in the exercise of its jurisdiction and became final and not subject to reversal by the commission upon the expiration of the time for filing

Defendant then concludes that ". . . the Commission lost 'power to deal with the case' for the lack of a timely petition for rehearing; re-examination of the award was forever foreclosed. The award 'became final and not subject to reversal by the commission.'"

However, we must disagree. The commission still had jurisdiction over the matter on December 23, 1957, for twenty days had not yet elapsed. By filing the "Election Remedies" on that date, the defendant notified the commission that she had never waiver her right to seek damages.[4] If the "Election" was to be countenanced the award could not stand. In addition, as a petition for rehearing the "Election" would prevent the award from becoming final and would preserve and continue the jurisdiction of the commission "to enter into such further proceedings as will result in a proper award." Smith v. Industrial Comm., 87 Ariz. 69, 347 P.2d 1010, 1011 (1959).

The "Record of Commission Action" of January 14, 1957, wherein the order of the Commission appears, unmistak-

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an application for rehearing. After the Commission has lost power to deal with the case, it cannot of its own motion or an application of any one re-examine evidence to determine whether its original decision was correct.

Green v. Industrial Comm., 78 Ariz. 347, 280 P.2d 268, 269-270 (1955); see also, London v. Industrial Comm., 71 Ariz. 111, 223 P.2d 929 (1950); Narramore v. Fannin's Gas & Equip. Co., 80 Ariz. 115, 293 P.2d 671 (1956).

4. Section 23-942, Ariz. Rev. Stat., comprising a part of the Workmen's Compensation Act, permits the Commission to dispense with the observation of "formal rules of procedure other than as provided in this chapter." There is no statute prescribing the form of an application for rehearing and we note that the Arizona Supreme Court has recognized that the Commission may in its discretion waive formal defects in a petition for rehearing. Nolasco v. Borden Co., 69 Ariz. 277, 212 P.2d 999 (1950); Rhoades v. Lee Moor Contracting Co., 60 Ariz. 161, 132 P.2d 432 (1942); Kasalica v. Ind. Comm., 65 Ariz. 28, 173 P.2d 636 (1946).

ably demonstrates that the "Election" was accepted and dealt with by that body as an application for rehearing.[5] By that order the Commission conformed the award to the "Election" making the former subject to and contingent upon plaintiff's first asserting a suit for damages. After such suit the award would be effective but only if plaintiff's

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5. The text of the "Record of Commission Action" is as follows:

The Industrial Commission of Arizona
RECORD OF COMMISSION'S ACTION

Case No. AP 24557

Bernice M. Frazier, Widow and Robert C. Frazier, Linda Joy Frazier, Kent M. Frazier and Cleveland J. Fraizer, Minor Children, Applicant, vs. Mountain States Construction Company, Defendant Employer. The Industrial Commission of Arizona, Defandant Insurance Carrier.

FINDINGS

1. That the above-named applicant, Bernice M. Frazier, having heretofore filed her widow's claim for compensation on September 28, 1957, for and on behalf of herself and the above-named minor children.

2. That this Commission treated said claim as applicant's election to accept benefits and compensation from this Commission provided by the Arizona Workmen's Compensation Laws, and this Commission thereafter on December 3, 1957, rendered its Findings and Award for Death Benefits in favor of said applicant and minor children.

3. That thereafter on December 23, 1957, the applicant filed an instrument designated as Election of Remedy wherein she specifically elected to proceed against a negligent third party defendant, reserving her right only to a deficiency, if any, against the defendant employer and the defendant insurance carrier.

ORDER

Now, Therefore, It Is Ordered that any and all death benefits due the applicant and said minor children under the terms of said award and the Arizona Workmen's Compensation Laws be, and the same are hereby suspended and withheld, pending the applicant's prosecution of all claims for all damages arising from the accident described in her said widow's claim, or until further order of this Commission.

recovery was less than the amount of the death benefits established by the award. In that event, plaintiff would be entitled to the difference.[6]

Following the District Court's decision on the Motion to Determine Jurisdiction and Motion for Summary Judgment, defendant commenced a suit in the Superior Court of Arizona under the Declaratory Judgment Act of that State and at the same time moved the District Court to suspend its proceedings pending the outcome of that suit. The denial of a stay is also assigned as error.

The issues tendered by defendant's complaint in the State Court were essentially the same as those presented to the District Court by defendant's Motion to Determine Jurisdiction and for Summary Judgment. Defendant, however, urges that since their resolution rested upon underlying questions of local law not the subject of statute nor as yet declared by the highest court of Arizona, the District Court "should have deferred its decision with respect to matters of local law until those issues could have been decided with finality in an action then pending in the state court."

We conclude that the lower court did not abuse its discretion by refusing to stay the proceeding before it.

The defendant had already submitted these very issues to the District Court and only after an adverse decision solicited the State Court to pass upon them. Justification for the denial of the stay might well be rested on that fact. However, there is a more cogent reason for our conclusion. Although the decision of a federal court on a doubtful issue

6. The award was not completely nullified. Under the Arizona statutory scheme if the recovery from the third party is less than the compensation to which he is otherwise entitled, then the deficiency is paid by the Commission. See 23-1023 C, Ariz. Rev. Stat.; Worthington v. Commission, 85 Ariz. 340, 338 P.2d 363 (1959).

of state law has been characterized as ". . . a forecast rather than a determination, . . . a tentative answer which may be displaced tomorrow by a state adjudication." (R.R. Comm. of Texas v. Pullman Co., 312 U.S. 496, 499, 500 (1941)) the Supreme Court has also repeatedly emphasized ". . . the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."

Moreover, that court has held that the mere fact the District Court in the exercise of its diversity jurisdiction is obliged to make decisions based upon its interpretation of state law is not alone sufficient ground for declining jurisdiction. Meredith v. Winter Haven, 320 U.S. 228, 234, (1943). In this connection it was declared that while "[t]he submission of special issues [to a state court] is a useful device in judicial administration in such circumstances as existed in the *Magnolia, Spector, Fidlerest* and *Pullman* cases, supra[7] . . . in the absence of special circumstances, 320 U.S. at 236, 237, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy." Propper v. Clark, 337 U.S. 472, 492 (1949). Here there were no problems of constitutionality or compelling considerations of policy present which constitute the "special circumstances" that would re-

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7. The cases referred to are:

Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1939). Federal jurisdiction was based on the Bankruptcy Act but the sole issue was one of state law.

Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944).

Chicago v. Fieldcrest Dairies, 316 U.S. 168 (1942).

Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496 (1941).

In these latter three cases it was held that the federal court should abstain from deciding an issue of state law in order to avoid a potential federal constitution issue. See also, Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); Annot. 8 A.L.R. 2d 1228

quire or merit a stay to enable defendant to secure from the state court a "definitive answer" to the questions presented.

The contention that the District Court erred in refusing to admit evidence of the award and its present value requires but little comment. Even assuming the award had a present value, this proof, offered for the purpose of mitigating damages, was clearly irrelevant. It is well established that ". . . liability of third party tort feasors is not intended to be disturbed by the Act" and that payments by an employer or an award by the Industrial Commission do not and cannot reduce such liability. State v. Pressley, supra, at p. 997 of 250 P.2d; see also, Siebrand v. Gossnell, 234 F.2d 81 (9th Cir. 1956); Powell v. Wagner, 178 F.Supp. 345 (D.C. Wis. 1959); Annot. 95 A.L.R. 515.

Defendant also complains of the refusal of the trial court to reopen the case for additional evidence. Several witnesses, among them Cooper for the plaintiff and Moore for the defendant, gave detailed "eye witness" accounts of the rock slide and of the accident. After both sides had rested and at the conclusion of the opening argument for plaintiff, counsel for defendant moved to reopen the case and to be allowed to recall Moore to testify that Cooper did not arrive at the scene until after the accident occurred. Counsel asserted that this evidence was only discovered immediately before the motion was made.

"Whether a case should be reopened for new testimony is peculiarly a matter within the discretion of the trial judge . . ." and this record does not show an abuse of that discretion. Anzano v. Metropolitan Life Ins. Co. of N. Y., 118 F.2d 430, 435 (3rd Cir. 1941); see also, Welsh v. Grindle, 251 F.2d 671 (9th Cir. 1957).

Defendant's lack of diligence is apparent. Cooper testified about the matter as plaintiff's first witness, and several days elapsed before defendant was put to its defense. The proposed evidence was readily available and defendant had ample opportunity in the interim. Moreover, the evidence, being primarily impeaching in character, was related to a collateral issue. "Appellate courts will not ordinarily hold that the trial court has abused its discretion in refusing to open a case for further testimony when such testimony . . . tends only to affect the credibility of witnesses . . . ." Stipich v. Krilich, 122 Wash. 306, 210 Pac. 788, 789 (1922); Chemical Delinting Co. v. Jackson, 193 F.2d 123 (5th Cir. 1952); Slappey v. United States, 110 F.2d 528 (5th Cir. 1940).

A further contention is that counsel for plaintiff was guilty of such misconduct as to entitle defendant to a new trial. The particular episode relied upon by defendant occurred during the redirect examination of Cooper, the construction superintendent of Mountain States Construction Co. After establishing that the Bureau of Reclamation had made an investigation of the accident, counsel asked the witness whether the Bureau held Mountain States responsible. The court ruled the question out on defendant's objection and directed the jury to disregard the negative answer which the witness had already given. Counsel then asked whether after the accident the Bureau had suggested that Mountain States discontinue any of its methods or that it adopt other procedures. These questions were answered without objection. Thereupon counsel caused a document to be marked for identification and in addressing the witness, said: "You are aware, are you not, Mr. Cooper, that the Bureau of Reclamation made an official report of

this investigation?" The witness answered, "I'm sure they did, yes, sir."[8]

Defendant argues that these questions and this use of the inadmissible report of the bureau were calculated to and did by indirection and insinuation get before the jury evidence that was so highly prejudicial as to effectively deny it a fair trial. This contention can best be answered by the following excerpt from Sclaster v. Simmons, 39 Ariz. 432, 7 P.2d 258, 260 (1932):

> However, all these things took place in the presence of the trial court, and upon a motion for new trial were

[8] In its brief defendant says: "Then, as contemplated and according to plan, opposing counsel, to course, for defendant objected, what objection was sustained." Defendant's statement suggests a darker picture than the facts warrant for the jury was not made aware that defendant objected to the admission of the exhibit into evidence. The record does show that immediately after the witness gave his answer the Court suspended further proceedings before the jury and held a private discussion with counsel and defendant's lawyer regarding further pursuit of this subject. We quote from the record:

> Mr. Mr. Kleindienst, attorney for defendant: I wonder if we could approach the bench just a moment?
>
> Privately to the Court:
>
> I am sure plaintiff is going to offer Plaintiff's Exhibit #2, the Bureau's report, which is hearsay on the face of it, and conclusion as to the results of the investigation of the safety persons for the Bureau of Reclamation, and it cannot be cross examined. I think it is highly prejudicial to even suggest it. We are already put into the position now of trying to conceal something that was done. I think it is highly improper and hearsay.
>
> Mr. Langerman, counsel for plaintiff: Your Honor, we wouldn't have gone into this, and we did not offer it in our direct case, except that Mr. Kleindienst kept implying that the Bureau had approved everything that the defendant was doing, and that is our position. I don't want the jury to get that impression.
>
> The Court: I will instruct counsel for the present not to go any farther with this.
>
> In Open Court.
>
> When the questioning resumed no further mention of the report or reference to the investigation was made before the jury.

> urged upon that court. The motion was denied and in such denial, they were necessarily held not to have prejudiced defendants' rights. The supervision of trials is committed to the trial court, and in matters involving the conduct of counsel, as well as other trial matters, unless it clearly appears that some prejudice has resulted, we think we should defer to the decision and judgment of the trial court. That court had the whole picture before it and was better qualified to pass on the question, and having done so, by the denial of the motion for new trial, we accept its decision and judgment.

Also specified as error is the trial court's denial of defendant's motion to implead the decedent's employer Mountain States Construction Company and two of its supervisors.

In support of its motion defendant urged that the persons sought to be joined were guilty of "active negligence in causing the accident while the negligence of the defendant was "passive." In essence, defendant asserted that it claimed a right to indemnity from said persons based on the doctrine that where one tort feasor is primarily liable and the other is secondarily liable, though both are liable to the injured party, the one secondarily liable is entitled to full indemnity from the one primarily liable for any damages which the one secondarily liable has sustained.[9]

Defendant's motion thus came within the provisions of Rule 14(a) of the Federal Rules of Civil Procedure, which

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9. Defendant was referring to the doctrine recognized by this court in United States v. Rothschild Stev. Co., 183 F.2d 181 (9th Cir. 1950). This right of indemnity exists in Arizona: Busy Bee Buffet v. Ferrell, 82 Ariz. 192, 310 P.2d 817 (1957). We, of course, express no opinion whether defendant's claim met these requirements or was valid.

enables a defendant to "serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."[10] However, the language of the rule that ". . . a defendant may move . . . for leave as a third-party plaintiff to serve a summons and complaint . . . [and] if the motion is granted . . . the person so served, hereinafter called the third party defendant, shall make his defenses . . ." clearly demonstrates that the decision whether to grant or deny leave is one committed to the discretion of the trial court: "and the timeliness of the motion is an urgent factor governing the exercise of such discretion." General Electric Co. v. Irvin, 274 F.2d 175, 178 (6th Cir. 1960). See also, Casey v. Calmar S.S. Corp., 138 F. Supp. 751 (D.C. Del. 1956); General Taxicab Assn. v. O'Shea, 109 F.2d 671 (D.C. Cir. 1940).

Here the motion was untimely. Defendant made it only a few minutes before the trial commenced and offered no excuse for the delay.

Defendant further complains of the court's refusal to instruct the jury on contributory negligence, voluntary assumption of risk and unavoidable accident, defenses which the defendant had tendered by its answer. Defendant was thus entitled to have these defenses submitted to the jury by proper instructions if they found support in the evidence—that is, if there was ". . . such relevant evidence as a reasonable mind might accept as adequate to support

10. The trial court was lenient in entertaining the motion at all. Rule 7 b) in pertinent part provides that motions "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought . . ." See generally, Sequoia Union High School Dist. v. United States, 245 F.2d 227 (9th Cir. 1957); in addition, since the motion was subsequent to answer, Rule 14 a) required that the motion be made on notice to plaintiff and Rule 6 d) directed that the motion and notice of hearing be served on plaintiff "not later than five days before the time specified for the hearing . . ." See General Elec. Co. v. Irvin, 274 F.2d 175 (6th Cir. 1960). Defendant failed to comply with all of those requirements.

a conclusion." Consol. Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938); see also, Howard v. R.R., 101 U.S. 837 (1879); Citizens Utilities v. Firemen's Ins. Co., 73 Ariz. 299, 240 P.2d 869 (1952).[11]

A careful review of the entire record fails to reveal evidence which directly or by inference would prove Frazier was or should have been aware of the peril created by the defendant. Lacking such knowledge he was neither guilty of failing to exercise due care for his own safety or deliberately exposing himself to that dangerous condition.

Nor was there any proof justifying the giving of an instruction on unavoidable accident, a term defined by the Arizona Supreme Court as "such an occurrence as under all the circumstances could not have been foreseen, anticipated or avoided in the exercise of ordinary care." Town & Country Securities Co. v. Place, 79 Ariz. 122, 285 P.2d 165, 167 (1955). Here there was no evidence tending to

11. Defendant may be urging that we apply a different standard. After quoting Art. 18, Sec. 5 of the Arizona Constitution: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, . . . be left to the jury," defendant argues that: "If there is any evidence whatsoever which would warrant a jury in finding that [illegible] was guilty of either contributory negligence or of assumption of risk, or in finding that the death resulted from unavoidable accident, such questions should have been submitted to the jury for its consideration." If defendant means that this provision of the State Constitution compels such instructions in any case then we must disagree. The Supreme Court of Arizona, in a decision construing the meaning and effect of the provision, has flatly held that "[u]nless, therefore, there was some substantial evidence from which a reasonable man might have inferred it [contributory negligence] existed the court should not have submitted the issue to the jury." Citizens Utilities Co. v. Firemen's Ins. Co., 73 Ariz. 299, 240 P.2d 869 (1952); moreover, as the Supreme Court pointed out in Herron v. So. Pac. Ry. Co., 283 U.S. 91 (1931), in a federal court the sufficiency of the evidence to raise an issue of fact for the jury is not a matter that is controlled by state law. See also, Allen v. Matson Nav. Co., 255 F.2d 273 (9th Cir. 1958); Reuter v. Eastern Airlines, 226 F.2d 443 (5th Cir. 1955); Diedrich v. Am. News Co., 128 F.2d 144 (10th Cir. 1942).

establish the accident was caused by anything other than negligence. Thus it appeared that the wall of the canyon in the vicinity of the slide area was of rock and although this was eroded by weather and already weakened by cracks and seams, it had been further weakened and rendered more likely to give way by a series of explosive charges which the defendant had set nearby. In addition, there was uncontradicted evidence to the effect that at the time or shortly before the slide occurred defendant was operating a power shovel within a distance of 40 to 60 feet from the rim of the canyon; this machine weighed at least 60 tons and when working caused the surrounding area within a radius of 50 to 75 feet to tremble and shake violently. A slide such as the one that occurred was obviously a foreseeable consequence of this operation.

It is, of course, possible as defendant argues, that the accident had its origin in some independent cause unrelated to the defendant's activities, but an inference must be based upon some concrete proof and not upon speculation or surmise. Gray v. Woods, 84 Ariz. 87, 324 P.2d 220 (1958).

The remaining assignment challenges the order of the District Court denying defendant's motion for new trial on the ground that the verdict was "grossly excessive and monstrous" and rendered under the influence of passion and prejudice. The verdict, general in form, was for $200,000.

Nowhere in the record does it appear that plaintiff made any appeal to sympathy or prejudice and the verdict is not so large in amount as to immediately suggest that the finding of the jury was governed by some improper motive even if size alone were to afford a basis for such an inference. Earl W. Baker & Co. v. Lagaly, 144 F.2d 344 (10th

Cir. 1944); Ford Motor Co. v. Mahone, 205 F.2d 267 (4th Cir. 1953); but see, Wetherbee v. Elgin, Joliet & Eastern Ry. Co., 191 F.2d 302 (7th Cir. 1951); Arkansas Cattle Co. v. Mann, 130 U.S. 69 (1889) and our own decision in So. Pac. v. Guthrie, 180 F.2d 295 (9th Cir. 1949), where the question was expressly left open.

The review of this ruling of the District Court must therefore be confined to a determination whether the damages assessed were so indisputably excessive in the light of the evidence that that court clearly erred in not exercising its power to intercede to prevent a manifest injustice; in short, we must decide whether the ruling constituted an abuse of discretion. Cobb v. Lepisto, 6 F.2d 128 (9th Cir. 1925); Siebrand v. Gossnell, 234 F.2d 81 (9th Cir. 1956); Union Pacific R.R. Co. v. Johnson, 249 F.2d 674 (9th Cir. 1957); see also, So. Pac. v. Guthrie, 186 F.2d 926 (9th Cir. 1951). In this field, "[t]here is difficulty . . . in getting at the pecuniary loss with precision or accuracy . . . the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury." Railroad Company v. Barron, 72 U.S. 90, 106 (1866).

As already noted, Frazier was a married man and the father of four minor children; he was 41 years of age at the time of his death and his life expectancy was 28 years. He was in good health, was an industrious and reliable worker, was a kindly and considerate man devoted to his wife and children, and was employed as a foreman by the Mountain States Construction Company. His regular monthly salary was $550.00 but his actual earnings while at the damsite averaged $750.00 due to overtime pay and in each of the last two months before the fatal accident his earnings were upwards of $900.00.

The Arizona wrongful-death statute broadly provides that "fair and just" compensation may be awarded by the

jury to the surviving parties who may ntitled to recover. Sec. 12-613, Ariz. Rev. Stat. Undeis statute, the jury was permitted, as the Court instruc to include in its verdict not only a "fair and just" vance for the actual pecuniary loss sustained by the w and each of the several children, but also a like alunce for such non-pecuniary elements of damage as lof companionship, comfort, and guidance that Frazierld have probably provided to them.

The difficulty in determining wheth the damages awarded to this plaintiff represented fair just compensation or whether they were "grossly exc e" or "monstrous" is obvious.[12] This because such fac as the duration of Frazier's life, his productivity and income, were at best probabilities and the subjective tters of companionship, counsel and guidance, to nam t a few of the other compensable items that the jury d rightly consider, were without a market at all.

> Here we are of the opinion that t erdict almost reaches the area of too much, but w lieve it is one which it is our duty to let stand. rial court has broader powers than we to ord A trials in large broader powers than we to order new new trial here, verdict cases. It saw fit not to order a on. which we hold to be within its discret

Union Pacific R.R. Co. v. Johnson, 249 F.2 674, 679 (9th Cir. 1957).

The judgment is AFFIRMED.

(Endorsed) Opinion Filed April 18, 19 1.

FRANK H. S MID, *Clerk*.

12. So. Pac. Co. v. Guthrie, 186 F.2d 926 (9t Cir. 1951).

UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

No. 16,543

MERRITT-CHAPMAN & SCOTT CORPORATION *Appellant.*

vs.

BERNICE M. FRAZIER *Appellee.*

Appeal from the United States District Court for the District of Arizona

This cause came on to be heard on the Transcript of Record from the United States District Court for the District of Arizona.

On consideration whereof, It is now ordered and adjudged by this Court, that the judgment of said District Court in this cause be and hereby is affirmed.

Endorsed judgment filed and entered April 18, 1961

FRANK H. SCHMID, Clerk

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF UNITED STATES

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Arizona

Article 2

§ 4. *Due process of law*

Section 4. No person shall be deprived of life, liberty, or property without due process of law.

§ 13. *Equal privileges and immunities*

Section 13. No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

Article 18

§ 5. *Contributory negligence and assumption of risk*

Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

STATUTES

Arizona Revised Statutes

§ 12-612. *Parties plaintiff; recovery; distribution*

A. An action for wrongful death shall be brought by and in the name of the surviving husband or wife or per-

sonal representative of the deceased person for and on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate.

C. The amount recovered in an action for wrongful death shall be distributed to the parties provided for in subsection A and in the proportions provided by law for distribution of personal estate left by persons dying intestate.

§ 12-613. *Measure of damages; nonliability for debts of decedent*

In an action for wrongful death, the jury shall give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover, and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default. The amount recovered in such action shall not be subject to debts or liabilities of the deceased, unless the action is brought on behalf of the decedent's estate. As amended Laws 1956, Ch. 46, § 2.

§ 14-201. *Succession when spouse survives*

When a person having a separate estate of inheritance, real, personal or mixed, dies intestate as to the estate and leaves a surviving husband or wife, the estate shall descend and pass as follows:

1. If the intestate is survived by a child or children or their descendants, the surviving husband or wife shall take one third of the personal estate, and the remainder of the personal estate shall go to the child or children of the intestate and their descendants. The surviving husband or wife shall also be entitled to an estate for life in one third of the real property of the intestate, with remainder to the child or children of the intestate and their descendants.

2. If the intestate is not survived by a child or children or their descendants, then the surviving husband or wife

shall be entitled to all the personal estate and one half of the real property of the intestate without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution, but if the intestate has neither surviving father or mother, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate.

§ 23-1021. *Right of employee to compensation*

B. Every employee covered by insurance in the state compensation fund who is injured by accident arising out of and in the course of employment, and the dependents of every such employee who is killed, provided the injury was not purposely self-inflicted, shall be paid such compensation from the state compensation fund for loss sustained on account of the injury, shall receive such medical, nurse and hospital services and medicines, and such amount of funeral expenses in event of death, as provided in this chapter.

§ 23-1023. *Liability of third person to injured employee; election of remedies*

B. If the election is to take compensation, the claim against such other person shall be assigned to the state for the benefit of the compensation fund, or to the person liable for the payment thereof. Such a claim assigned to the state may be prosecuted or compromised by the commission.

§ 23-1024. *Choice of remedy as waiver of alternate remedy*

A. An employee, or his legal representative in event death results, who makes application for an award, or with the consent of the commission accepts compensation from an employer, waives the right to exercise any option to institute proceedings in court.

B. An employee, or his legal representative in event death results, who exercises any option to institute proceed

ings in court waives any right to an award or direct payment of compensation from his employer.

§ 23-1025. *Agreement by employee to waive compensation or to pay premium void*

An agreement by an employee to waive his rights to compensation, except as provided in this chapter, or an agreement by an employee to pay any portion of the premium paid by his employer, except for accident benefits, shall be void.

§ 23-1061. *Application for compensation or increase of compensation; limitation; duty of physician*

C. Like application shall be made for an increase or rearrangement of compensation. No increase or rearrangement shall be operative for any period prior to application therefor, and any increase or rearrangement shall be within the limits and classifications provided in this chapter.

Rules of Procedure Before THE INDUSTRIAL COMMISSION of Arizona

Effective June 15, 1959

37. *Rehearing; Time of Application; Protest:*—Any party aggrieved by any award or decision of the Commission granting or denying compensation must file his application for a rehearing thereof at the office of the Commission, Arizona State Building, Phoenix, Arizona, within twenty (20) days after the service of the award or the decision complained of. Filing of application as contemplated above, means actual receipt of the same at the office of the Commission, and not date of mailing or date appearing on instrument.

In the event the party aggrieved by any award or decision of the Commission granting or denying compensation, files his written notice of protest within twenty (20) days after the service of the award or the decision complained of said notice of protest will stay said award or decision from becoming final and will allow said aggrieved party twenty (20) days from the date of filing said written notice of protest within which to file his application for a rehearing of said award or decision at the office of the Commission. Failure to file said application for rehearing within said twenty (20) days from the filing of said written notice of protest constitutes a waiver of the right to rehearing.

38. *Grounds for Rehearing Must Be Set Forth*: Such application must be verified on oath, and must set forth specifically and in detail the grounds on which the applicant therefor considers such award or decision to be unjust or unlawful and every issue to be considered by the Commission.

(a) If the grounds upon which such rehearing is requested are that the evidence does not justify the findings or that the findings do not support the decision or award, the application for rehearing shall state specifically wherein the findings are not supported by evidence, or wherein the decision or award is not justified by the findings.

(b) Every ground or complaint, or defense, to such award or decision not so specified in such petition shall be deemed fully and finally waived.

(c) Where the applicant for such rehearing desires to introduce new evidence, the application shall set forth specifically and in detail the nature and substance of the new evidence, with the names and addresses of the witnesses to be produced, the exhibits to be introduced, and a full statement why such evidence, exhibits or testimony could

not have been produced prior to the rendering of the award or decision, with the exercise of reasonable diligence. Such offer of new evidence may be disregarded unless this rule is complied with. See: A.R.S. Secs. 23-105, 106, 922 and 23-941 and 23-942.

39. *Hearing, Rehearing Upon Motion of Commission; Notice:*—The Commission, when in its judgment it is necessary, may hold a hearing or rehearing in any claim, case or matter within its jurisdiction upon its own motion by giving ten (10) days' notice in writing, of the time and the place and the matter to be considered or determined in said hearing or rehearing.

40. *Service of Application for Rehearing:*—A copy of such application for a rehearing must be served forthwith upon all adverse parties, and any such adverse party may, at his option, file and similarly serve a verified answer thereto within ten (10) days.

The Commission may require a copy of such application to be served upon such interested party or parties as may be designated by it.

41. *Hearings Not Formal But Judicial:*—Every hearing upon a claim, held before the Commission, a Commissioner, inspector, referee or arbitration committee of the Commission, shall be conducted as a judicial proceeding; all witnesses testifying under oath or by affirmation, and a record of the proceedings shall be made and kept. Such hearings shall be conducted in such manner as to ascertain the substantial rights of the parties and the Commission, a Commissioner, referee or arbitration committee of the Commission shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure.

70. *Who Can Elect Remedy:*—If a workman entitled to compensation is injured or killed by the negligence or wrong of another not in the same employ, the employee, or in the case of his death, his dependants, shall elect whether to take compensation under the Workmen's Compensation Law or to pursue his or their remedy against such other.

71. *Notice of Election to Commission:*—If the employee, or in the case of his death, his dependents, elect to take compensation, written notice of such election shall be given to the Commission immediately and an assignment of the cause of action against such other person shall be made to the insurance carrier liable for such compensation.

72. *Acceptance of Compensation Constitutes Election:*—The acceptance of compensation from the Commission or other insurance carrier, shall be deemed to be an election to take compensation.

73. *Filing Claim Election; May Be Withdrawn:*—The filing with the Commission of a claim for compensation shall be deemed an election by the person filing same to take compensation. In the event that the insurance carrier shall deny liability to pay compensation to such person, the Commission may allow such claim to be withdrawn at any time prior to the rendition of the award.

74. *Election To Sue Third Party and Claim Deficiency Compensation:*—

(a) If the employee, or in case of his death, his dependents, elect to proceed against the third person or persons and to claim compensation in the amount of any deficiency between the amount actually collected in the action, or any compromise thereof, and the compensation provided by the compensation law, such person or persons shall before process is served upon such third person, or persons, file

written notice of such election with the Commission substantially as provided in the Commission's form No. C-471, and with the insurance carrier.

(b) The filing of an action in a court of law and serving process upon the defendants therein, prior to filing written notice of election as provided in the preceding paragraph, shall be deemed an election to pursue the remedy solely against any person or persons, against whom a cause of action for the injury, or death, is pleaded in such action, and shall constitute a waiver of compensation.

(c) If a workman entitled to compensation is injured, or killed by the negligence or wrong of another not in the same employ, and he also has a cause of action against said third person for property damage proximately caused by the same negligence, or wrong, of said third person, the Commission may give its consent that the two causes of action be consolidated for trial.

75. *Commission May Determine Liability of Third Person:*—Notwithstanding the filing of any such action, the Commission may, in its discretion, proceed to determine whether the injury or death was caused by legal negligence or legal wrong of another not in the same employ; and if the Commission should find that there is no cause of action against the person sued, an award of compensation will be made.

76. *Compromise of Claim Invalid Unless Approved:*—A compromise of any such cause of action made without the written approval of the insurance carrier will be deemed null and void; and will not be deemed an election to pursue the person to whom such compromise is so given. If, but for such compromise, the carrier could have recouped his liability in whole or in part, the amount which the carrier might have recouped, may be deducted from the award. See: A.R.S. Sec. 23-1023.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 266

MERRITT-CHAPMAN & SCOTT CORPORATION,
Appellant,

vs.

BERNICE M. FRAZIER,
Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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Brief for Respondent in Opposition

ARGUMENT

I.

Petitioner urges that the court below did not give proper effect to respondent's technical failure to file a timely petition for rehearing with the Industrial Commission of Arizona within twenty days following the Commission's award of December 3, 1957. There is no dispute that within the twenty-day period, respondent did file an "Election of Remedies" form. In effect, petitioner simply takes the posi-

tion that respondent filed the wrong piece of paper and is thereby barred.

The record unmistakably demonstrates that during the twenty days following the award of December 3, 1957, the Industrial Commission was notified of the possibility of a third party action (R. 18-19). The record also demonstrates that the Industrial Commission treated the matter as open and when the "Election of Remedies" was filed (R. 42), the Commission then entered an order suspending the award (R. 46). The court below properly recognized that the Industrial Commission accepted and dealt with the "Election" as an application for rehearing. If there was a formal defect, the Commission certainly had the power to waive such defect and did. *Nolasco v. Borden Co.*, 69 Ariz. 277, 212 P.2d 999 (1950).

Petitioner contends that on this subject the Court of Appeals adopted "a new theory that was neither urged nor argued". This was petitioner's contention in its Petition for Rehearing to the court below. The fact is that exhaustive treatment was given to this subject as is indicated by reference to the first three sections of Appellant's Opening Brief to the court below, the first section of Appellee's Brief and the first section of Appellant's Reply Brief. Indeed, the specific point that the "Election" form, in lieu of a formal application for rehearing, preserved the jurisdiction of the Commission, and was deemed by the Commission to so preserve its jurisdiction, was raised and presented both in oral argument to the court below and in the briefs. See, for example, Appellee's Brief, page 11.

We respectfully submit that petitioner's position on the merits of this question is untenable. It should also be pointed out that this Court has repeatedly ruled that certiorari will not be granted except in cases involving prin-

ciples, the settlement of which is important to the public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal. See, e.g., *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). Such is certainly not the case here.

II.

Petitioner's next contention is that the issues of contributory negligence and assumption of risk should have been submitted to the jury. More specifically, petitioner urges that Article 18, Section 5, of the Arizona Constitution makes the jury the sole judge of these defenses and that by taking the issues from the jury, the petitioner was denied its constitutional right. It should be emphasized that the Arizona Constitution does not require the trial court to submit the issues of contributory negligence or assumption of risk to the jury when there is no evidence to support these defenses.* The trial judge ruled that there was no such evidence after listening to all of the proceedings, observing all of the witnesses, reviewing all of the testimony and careful and judicious consideration. His ruling was confirmed by the Court of Appeals. This Court has held that it will not enter upon a minute analysis of the evidence when it is the concurrent judgment of the District Court and the Circuit Court of Appeals that the evidence fails to support the petitioner's contentions. *Kelly v. Everglades Drainage Dist.*, 319 U.S. 415 (1943); *U.S. v. Johnston*, 268 U.S. 220 (1925); *Bochmer v. Pennsylvania R.R. Co.*, 252 U.S. 496 (1920). No further canvassing of this issue would seem indicated.

*See Opinion of Court Below, footnote 11.

III.

Petitioner next contends that the verdict below was monstrous. Petitioner's position is based on a cold analysis of the decedent's earnings without taking into account, not only the uncontradicted evidence that his income was rising, but, more important, without regard to other substantial elements of damage properly instructed upon by the trial court under the Arizona Wrongful Death Statute, such as loss of companionship, comfort, guidance and counsel, to name just a few. These elements are, of course, peculiarly within the discretion of the jury and trial judge. The court below held that the trial court did not abuse its discretion in its ruling upon the award. Now petitioner asks this Court to review the evidence on damages despite the concurrent judgment of the District Court and the Circuit Court of Appeals upholding the award. That this is not the function of the Supreme Court on petition for certiorari is supported by the authorities cited immediately above, which condemn requests to rehash the evidence adduced at the trial level.

IV.

Finally, petitioner assigns the failure below to stay these proceedings pending determination of a suit filed in the Arizona State Court. It should be first pointed out that the issues tendered in the State Court action were first presented to the Federal District Court. Only after an adverse decision by the Federal District Court did petitioner bring the State Court action. Having first invoked the federal jurisdiction, we submit that petitioner should not now be heard to complain that the Federal Court didn't stay the proceedings pending petitioner's "second shot" in the State Court.

The court below, in its opinion, properly pointed out that the mere fact that a Federal District Court, in the exercise of its diversity jurisdiction, is obliged to make decisions based upon an interpretation of State law is not alone sufficient ground for declining jurisdiction. (Opinion of Court Below, Petitioner's Appendix, page 8). In this connection, the court pointed out further that a stay of proceedings might be indicated, under special circumstances, to enable a party to secure from a State Court a definitive answer to questions involving State law. The special circumstances which would merit a stay include problems of constitutionality or compelling considerations of policy. Just as the court below pointed out that such "special circumstances" were not present so as to compel a stay of proceedings, we would point out that similarly these "special circumstanes", which are also a condition precedent to a grant by this Court of certiorari, continue to be absent.

Petitioner parades fancied horrors which allegedly will follow a denial of its application for certiorari. This parade of horrors assumes that respondent will apply for industrial compensation, that such application will be granted, that the Commission will then file a subrogation action against the petitioner and that all of these proceedings will be upheld by courts of competent jurisdiction. None of these contingencies have as yet arisen. Indeed, to the contrary, respondent has repeatedly stated on the record that she has no intention, nor does she feel she has any right, to apply for an industrial award, having elected to pursue her third party remedy. This Court has repeatedly ruled that it will not decide constitutional issues which are hypothetical in advance of the necessity for deciding them. See, e.g., *Asburn Hospital v. Cass County*, 326 U.S. 207, (1945); *Barker Printing Co. v. Local No. 731*, 281 U.S. 462 (1930).

As part of this ground, petitioner raises the question of the constitutionality of Arizona's Wrongful Death Statute, A.R.S. Section 12-613. The question of the constitutionality of this statute was nowhere and at no time presented to the court below. This Court will not ordinarily decide questions on certiorari not dealt with by the Circuit Court of Appeals. *U.S. v. Fleischman*, 339 U.S. 349 (1950); *Huddleston v. Dwyer*, 322 U.S. 232 (1944); *Owens v. Union Pac. R. Co.*, 319 U.S. 715 (1943), cert. den., 323 U.S. 740; *Sonzinsky v. U.S.*, 300 U.S. 506 (1937).

CONCLUSION

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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